

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 288 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE S.D.DAVE and
MR.JUSTICE R.R.JAIN

- =====
1. Whether Reporters of Local Papers may be allowed
to see the judgements? No
 2. To be referred to the Reporter or not? No
 - J 3. Whether Their Lordships wish to see the fair copy
of the judgement? No
 4. Whether this case involves a substantial question
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder? No
 5. Whether it is to be circulated to the Civil Judge?
No

THAKORE NATUJI JIVAJI

Versus

THE STATE OF GUJARAT

Appearance:

MR YU MALIK for Petitioners

MR. S.R.DIVETIA, LD.PUBLIC PROSECUTOR for Respondent No.1

CORAM : MR.JUSTICE S.D.DAVE and
MR.JUSTICE R.R.JAIN

Date of decision: 29/11/96

ORAL JUDGEMENT

Per: S.D. Dave, J :-

The appellants before us have been convicted for
the offence punishable under Section 302 and 447, read
with Section 34 of the I.P.C., and they have been

sentenced to the imprisonment for life and the fine of Rs.5,000-00 each, in default, they have been given the S.I. for two years. No separate sentence has been awarded for the offence punishable under Section 447 I.P.C. The above said judgment of conviction and sentence dated February 09, 1994, has been brought in challenge before us by the appellants.

The appellants before us who are the original accused persons stood charged for the alleged commission of the offence punishable under Section 447 and 302 I.P.C. r/w Section 34 I.P.C.

The case of the prosecution in brief is that, the complainant Bhaijibhai, a resident of village Kuntej has got agricultural lands admeasuring 25 wighas known as Kharodiya, and at the relevant time cotton crop was standing therein and therefore he was required to be in the field. According to him, on February 15, 1992, he was in his field with a powerful torch and had heard the hue & cry in the field of the deceased Bachuji and had seen the assailants assaulting upon the deceased in the field. According to the say of the complainant, having realised that the deceased Bachuji has received serious injuries, he had returned to the village and had informed the wife and son of the deceased. They and certain other people had returned to the spot of the occurrence with a bullock cart and the injured was removed to the house. It is the case of the prosecution that, during this time the deceased had given out the oral dying declaration, saying that, he was assaulted upon by the present appellants. Before the deceased could be shifted to the hospital he had died. The F I R came to be registered at Viramgam police station on the next day at about 9.30 a.m. On the basis of the above said F.I.R. the offence was registered and investigation had started. The accused persons were arrested, the muddamal weapons were recovered and were forwarded for the opinion of the Forensic Expert. The Report thereof has been obtained. At the conclusion of the investigation the accused people came to be chargesheeted for the said offences. They have been tried by the learned Addl. Sessions Judge and have been convicted and sentenced as indicated by us above.

Ld. counsel Mr. Malik who appears on behalf of the appellants assails the judgment of conviction and sentence, firstly on the ground that the complainant Bhaijibhai PW-1 Exhibit-9 cannot be an eye witness to the incident and that, at any rate he could not have seen the incident and the assailants belabouring the deceased.

Ld. counsel Mr. Malik further urges that, not only the evidence of the complainant Bhaijibhai suffers from the vice of material double speak versions, but that he stands belied by the medical evidence on record. Mr. Malik also further urges that the entire case of the prosecution regarding the oral dying declaration is not believable. Of course the combat coming from Ld. Govt. Counsel Mr. Divetia is that, the prosecution has been able to establish that the complainant Bhaijibhai was an eye witness to the incident and he had seen the present appellants assaulting upon the deceased, and that, the Court below has committed no error in placing reliance upon the said evidence. It is also the contention coming from learned Govt. Counsel that the evidence regarding the oral dying declaration, made out by the deceased in presence of the complainant and his wife and son also is a full proof one and that, the Court below can not be said to be at an error in accepting the above said evidence. Ld. Govt. Counsel Mr. Divetia therefore urges before us that, there is no reason for us to upset the judgment of conviction and sentence rendered by the Court below.

Firstly taking up the oral testimony of complainant Bhaijibhai, PW-1, Exhibit-9, it is clear that, according to him, he was in his field and as he was also required to keep a watch over the standing crop of cotton in the other field, he was required to go towards that field and that, when he was doing so he was having a powerful torch with him. He has testified that he had heard the cries for the help coming from the field of the deceased and therefore he had gone towards the said field and had seen the two appellants belabouring the deceased. Complainant Bhaijibhai says that the accused no.1 was having a dharia with him, while the accused no.2 was having a stick and that, they were belabouring the deceased with the above said weapons. The complainant does not stop here and proceeds further to say that, the accused no.1 had given a dharia blow on the head of the deceased, while the accused no.2 had given stick blows on the hands of the deceased. He says with great emphasis that he was able to see all this in the light of a powerful torch.

During the cross examination the complainant was required to give different versions regarding what he had actually seen. As indicated above earlier, it was his say that he had seen the accused persons belabouring the deceased. Any how, during the cross examination, by changing his version the complainant has said that, when he had heard the cries for the help he had understood

that the cries were coming from the field of the deceased and that, therefore, he had thrown the torch light and had seen the accused persons who were running away from the spot after the assault. This is a material change in the version given by the complainant. But he has yet one more version to give, and therefore he says that, he had raised shouts asking upon the assailants not to belabour the deceased, and later on he had gone to the spot of the occurrence and had seen that the deceased was lying there in the injured condition and he was bleeding profusely. This is no doubt a third version given by the complainant. Needless it is to say that these three versions are altogether different in nature. At one juncture he wanted to say that when he had thrown the torch light he could see the appellants actually belabouring the deceased. In the second revised version he says that he had also raised shouts after he had seen the assailants running away. This appears hardly to be probable. More over, if his version is to be believed he wants to convey that even after the assault was over and when the assailants were running away he had raised shouts and had called upon them not to beat. But once again, according to him, when he goes to the field after covering a distance of about 350 to 400 ft. the assailants were still there with the weapons. This is hardly a possibility. In case in which two assailants would assault upon the deceased at mid night with a clear intention to kill him, the assailants would not wait there even after hearing the shouts from the complainant. The whole evidence therefore tendered by the complainant in this respect appears to be doubtful.

One has to remember that the complainant had a poor vision due to the trouble which the complainant had at that time in one of the eyes. But even the said fact is taken out of the zone of consideration, then also the simple question would remain as to whether the complainant would be able to see the incident that had taken place in the field of the deceased. The answer to this question must be in a clear negative, because when the sketch of the scene of occurrence along with the evidence of Circle Inspector Kiritkumar Maniar at Exhibit-31 is seen, it is clear that, though the fields which intervened the vision could be 2 to 3, there was a standing crop of cotton in all these fields and that all these fields were surrounded by the hedges. It would not be possible for the complainant to see the occurrence because of the barricades being created by the hedges and the standing crop. The map of the scene of occurrence at Exhibit-32 also would go to support this conclusion. In our view, therefore, the complainant cannot be believed

when he says that he had seen or that he was able to see the occurrence which was occurring at the mid night amidst the standing crop, from such a distance.

There is one more important aspect which should not escape our conscience. The medical evidence runs counter to the ocular version being presented by the complainant. As stated before, the accused no.1 had a dharia with him, while the accused no.2 was having a stick and that the deceased was belaboured by both the accused persons. The complainant in his zeal to support the case of the prosecution has gone further to the extent of saying that, the accused no.1 had given a dharia blow on the head of the deceased. Unfortunately the Postmortem Report at Exhibit-38 does not support this version. This Postmortem Report does not show any injury which could have been caused by a dharia on the head. In other words the medical evidence on record runs counter to the ocular version, being presented by the complainant, who claims to be the eye witness.

Because of these three important aspects of the case, namely (1) the varying version of the complainant, (2) the distance from which he was allegedly viewing the incident and the creation of the obstacles by the hedges and the standing crop, and (3) lastly because of the contradiction between the medical evidence and the ocular version, we are not prepared to place any reliance whatsoever on the testimony being furnished by the complainant. This important aspect of the case has escaped the notice of the learned trial Judge, or else the conviction could not have been based on this evidence.

The second important branch of the evidence, according to learned Govt. Counsel Mr. Divetia is the oral dying declaration. As indicated by us above, it is the contention coming from learned defence counsel that the case of the prosecution in this respect is utterly unbelievable. On the perusal of the entire material on this question, we are in agreement with the contention coming from learned counsel Mr. Malik in this respect. The say of the complainant is that, the deceased had given out the oral dying declaration. He says that, the deceased had told him by way of an oral dying declaration in presence of his wife and the son that, " he was beaten by Natuji Jivaji and Harshibhai Khodabhai". It is pertinent to notice that the complainant does not say anything regarding the version or the say of the deceased in respect of the weapons to be utilised and the part of his own body on which the injuries or the blows were

received. Any how, when the case put forth by Kadvabhai, PW-3, Exhibit-28 in this respect is referred, he has tried to enlarge the scope of the dying declaration with a view to indicate not only the weapons utilised in the assault but also to indicate the part of the body of the deceased on which the blows were received. Kadvabhai has stated in his evidence that, after the mid night the complainant had approached them and they were informed that his father has been assaulted. His say further is that, thereafter they had gone to the field with a bullock cart. He also says that, though the complainant told him and his mother that his father has been seriously injured, they had never inquired from Bhaijibhai as to who were the assailants. This conduct does not appear to be in consonance with the human nature. More over even if Kadvabhai does not inquire, then also, ordinarily one would expect the complainant atleast to give out the names of the two assailants to the near and the dear of the deceased. Any how this has not been done.

Kadvabhai has concentrated upon the oral dying declaration and has said that, his father had told him that the assailants were the accused persons, and that the accused no.1 had given a dharia blow while accused no.2 had given the stick blow. He further says that the deceased had also told that the dharia blow as given on the head, while the stick blow was given on the hand. Therefore making a departure from the say of the complainant describing a brief dying declaration, Kadvabhai undisputedly has tried to enlarge the scope of the dying declaration bringing in not only the weapons but also the part of the body on which the injuries were sustained by the deceased. One can say that this has been done by witness Kadvabhai obviously with an intention to make the case of the prosecution more specific not only in respect of the weapons but also in respect of the parts of the body on which the deceased had received the injuries. P.W-4 Gomtiben Exhibit-29 has also fallen in the very same line. She also says that, her husband had given complete information in the oral dying declaration, not only in respect of the weapons utilised but also the parts of the body on which the injuries came to be received by the deceased. Therefore the wife of the deceased Gomtiben also in our opinion has tried to expand the limits of the oral dying declaration in such a way so as to indicate not only the weapons utilised but also the parts of the body of the deceased on which the injuries were received. Therefore in our view a brief dying declaration allegedly made by the deceased according to the complainant came to be widened

in ambit by the other two witnesses, obviously with the sole view of broadening its limit. Ordinarily the oral dying declaration if could be believed and if found it trustworthy, impressing the judicial conscience, the conviction could be based upon the same. But one has to be careful while examining the case of the prosecution regarding the oral dying declaration and one has to be emphatic regarding the exact say of the deceased. As indicated above the versions are not only differing but the later two versions coming from Kadvabhai and Gomtiben are found to be broadened in limit with a view to incorporate the particulars with regard to the weapons and the part of the body on which the injuries could be received.

The very same aspect regarding the contradiction between the medical and oral version also would come into play herein. When the reference is made once again to the medical evidence on record, it is clear that there was no injury on the head of the deceased. The oral dying declaration which otherwise also according to us cannot be accepted as a genuine and trustworthy one, suffers a fatal blow by the medical evidence in this respect. It is therefore abundantly clear that the oral dying declaration could not have been relied upon by the learned trial Judge and could not have been utilised with a view to come to the conclusion that the appellants are the assailants.

More over, nowhere the prosecution has come with even a theory that the deceased was able to speak after having received such injuries. The Autopsy Surgeon could have been called for, in aid to prove this aspect of the case. There is no evidence whatsoever coming from the autopsy surgeon that, even after having received such injuries, the deceased would be able to make out the oral dying declaration. Even this part of the case of the prosecution, which according to us is an infirmity, is taken out of the zone of consideration, then also, the case regarding the oral dying declaration cannot be accepted, regard being had to the non specific versions and these versions running counter to the medical evidence on record.

It is the suggestion coming from learned Govt. Counsel Mr. Divetia that the case of the prosecution is also being supported by the discovery of the muddamal weapons. But this discovery even if accepted on its face value would not further the case of the prosecution, but in our view would destroy it. This is so because there was no injury on the person of the deceased which could

have been caused by the discovered weapon, namely the dharia.

Therefore, in our opinion the learned trial Judge was at an error in placing reliance upon the ocular version regarding the incident coming from the so called eye witness, the complainant. The learned trial Judge was equally at an error in placing reliance upon the so called oral dying declaration to be made out by the deceased before the complainant and two other prosecution witnesses. In our view, unfortunately the important aspect regarding the controversy between the medical evidence on one hand and the ocular version on the other hand has also escaped the notice of the learned trial Judge.

Because of this situation we are not in a position to agree with the conclusion rendered by the learned trial Judge and with the reasonings adopted to come to the said conclusion. We are of the opinion that the present appeal succeeds and the same requires to be allowed. We order accordingly.

The present appeal therefore stands allowed, and the judgment of conviction and sentence under challenge stands quashed and set aside. The appellants are hereby acquitted of the charges for which they were convicted by the Court below. The appellants are behind the bars at a post conviction stage, and therefore, they should be set at liberty forthwith, if not required in any other criminal case or proceedings.
